

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
March 16, 2006 Session

**CATHERINE MORMAN v. CHRISTOPHER MORMAN**

**Appeal from the Circuit Court for Montgomery County**  
**No. 50200945     Ross H. Hicks, Judge**

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**No. M2005-00931-COA-R3-CV - Filed on July 25, 2006**

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This appeal originates from a post-divorce dispute over custody of the parties' two minor children. The parties agreed to Mother's designation as primary residential parent in the Permanent Parenting Plan that was incorporated into the Divorce Decree. Eleven months later, Father filed a petition to modify the parenting plan due to Mother's willful failure to comply with the plan and her attempts to interfere with Father's communication and relationship with the children. The trial court found a material change of circumstances and that it was in the best interest of the children for Father to be the primary residential parent. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

David B. Lyons, Nashville, Tennessee, for the appellant, Catherine Morman.

Carrie W. Gasaway, Clarksville, Tennessee, for the appellee, Christopher Morman.

**OPINION**

The marriage of Catherine Morman, Mother, and Christopher Morman, Father, produced two children. The children were five and four years of age at the time of their parents' divorce on June 5, 2003. Pursuant to an agreed permanent parenting plan, entered as part of the final decree of divorce, Mother was designated as the primary residential parent.

Difficulties arose almost immediately following the entry of the divorce decree. In August of 2003, one month after the divorce, Father filed a motion complaining that Mother was planning to move out of the county, to Portland, Tennessee, and that she was refusing to disclose the address or phone number where she and the children would be living. Mother denied Father's allegations, and contended she was not in the process of moving, but admitted she was planning to move at a later date. The trial court issued a protective order preventing Mother from leaving the jurisdiction with the children.

A few months later, in December of 2003, Mother notified Father she was married and intended to move to Portland, Tennessee to live with her spouse and the children. Upon receipt of the notice, Father promptly filed a motion to prevent Mother from moving with the children. The trial court ruled that Mother could not move with the children. Mother complied with the order; nevertheless, tensions between the parents continued and escalated.

Two significant pleadings were filed the following summer. After the school year ended, Mother filed a motion to modify the previous order, seeking permission to move the children to Portland and to enroll them in school in Sumner County while Father filed a Petition for Contempt and to Modify Permanent Parenting Plan.<sup>1</sup> Father claimed Mother interfered with his relationship with the children by hanging up on him when he called to speak with them. He also claimed that she refused to give him information regarding the children's day care and counseling the children were receiving, and interfered with his parental rights by not identifying him as a parent on the registration forms at the day care center.

A flurry of motions, counter-motions and hearings on the motions ensued, culminating in a final evidentiary hearing on Father's Petition to Modify the Parenting Plan which was held in February of 2005. Father, Mother and four additional witnesses testified at the hearing. Following the evidentiary hearing, the trial court concluded that a material change in circumstances had occurred based upon Mother's unwillingness to cooperate with Father in parenting the children. It further found that the changes affected the children's best interest and Father would be more likely to facilitate cooperation and communication regarding the children. Based upon these findings, the trial court changed the plan by naming Father as the primary residential parent.

Mother appeals asserting four issues. We believe the dispositive issues are whether there was a material change in circumstances to warrant a change in the parenting plan, and whether the trial court erred by giving too much weight to Tenn. Code Ann. § 36-6-110(a)(10).

#### STANDARD OF REVIEW

This court reviews custody and visitation decisions *de novo* with a presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise. *Kendrick v. Shoemaker*, 90 S.W.3d 566, 569 (Tenn. 2002); *Nichols v. Nichols*, 792 S.W.2d 713, 716 (Tenn.1990). Moreover, appellate courts are reluctant to second-guess a trial court's determination regarding custody and visitation. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999). This is because of the broad discretion given trial courts in matters of child custody, visitation and related issues. *Id.*; *see also Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001). Custody decisions often hinge on subtle factors, such as the parents' demeanor and credibility during the proceedings. *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997). Accordingly, trial courts have broad discretion to fashion custody and visitation arrangements that best suit the unique circumstances of each case. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999).

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<sup>1</sup>Father's petition was filed on June 21, 2004.

Furthermore, it is not the role of the appellate courts to "tweak [parenting plans] . . . in the hopes of achieving a more reasonable result than the trial court." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). This is particularly true when no error is evident from the record. *Id.* Thus, a trial court's decision regarding custody or visitation will be set aside only when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Id.*

### **MATERIAL CHANGE OF CIRCUMSTANCES**

The law is well established that when a decree awarding custody of children has been entered, that decree is *res judicata* and is conclusive in a subsequent application to change custody unless some new fact has occurred which has altered the circumstances in a material way so that the welfare of the child requires a change of custody. *Long v. Long*, 488 S.W.2d 729 (Tenn. Ct. App.1972). Thus, once the trial court has made an initial determination with respect to custody, it cannot entertain a subsequent petition to modify custody absent a material change in circumstances such that the welfare of the child demands a redetermination. *See* Tenn. Code Ann. § 36-6-101(C); *see also Massengale v. Massengale*, 915 S.W.2d 818, 819 (Tenn. Ct. App.1995).

The threshold issue in modification proceedings is "whether a material change in circumstances has occurred after the initial custody determination." *Kendrick v. Shoemaker*, 90 S.W.3d 566, 570 (Tenn. 2002) (quoting *Blair v. Badenhope*, 77 S.W.3d 137, 150 (Tenn. 2002)). The burden is on the petitioner to prove, by a preponderance of the evidence, a material change of circumstance affecting the child's best interest." Tenn. Code Ann. § 36-6-101(C).

A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance for purposes of modification of a residential parenting schedule may include, but is not limited to, significant changes in the needs of the child over time, which may include changes relating to age; significant changes in the parent's living or working condition that significantly affect parenting; *failure to adhere to the parenting plan; or other circumstances making a change in the residential parenting time in the best interest of the child.*

Tenn. Code Ann. § 36-6-101(C) (emphasis added). There are no hard and fast rules for determining when a child's circumstances have changed sufficiently to warrant a change of custody. *Kendrick*, 90 S.W.3d at 570. The following factors are considered an appropriate basis for holding that a material change in circumstances has occurred: (1) the change occurred "after the entry of the order sought to be modified," (2) the change was "not known or reasonably anticipated when the order was entered," and (3) the change "affects the child's well-being in a meaningful way." *Kendrick*, 90 S.W.3d at 570 (quoting *Blair*, 77 S.W.3d at 150); *see also Dalton v. Dalton*, 858 S.W.2d 324, 326 (Tenn. Ct. App. 1993) (holding a change of circumstances affecting the welfare of the child may include any "new facts or changed conditions that could not be anticipated by the former decree.) If a material change in circumstances has occurred, it must then be determined whether the

modification is in the child's best interests, which should be made according to the factors enumerated in Tenn. Code Ann. § 36-6-106. *Kendrick*, 90 S.W.3d at 570.

Change of custody is not appropriate as a method to punish a parent for failing to comply with court orders regarding visitation, *Pizzillo v. Pizzillo*, 884 S.W.2d 749, 757 (Tenn. Ct. App. 1994); however, the legislature and the courts have recognized the importance to the child's well-being of maintaining a relationship with the non-custodial parent. Tenn. Code Ann. § 36-6-106(10); *Wilson v. Wilson*, 987 S.W.2d 555, 564 (Tenn. Ct. App. 1998). Thus, a custodial parent's obstruction of the non-custodial parent's visitation rights or conduct to preclude continuation of the parent-child relationship is a sufficient change of circumstances to warrant further consideration of a change of custody. *Roache v. Bourisaw*, M2000-02651-COA-R3-CV, 2001 WL 1191379, at \*6 (Tenn. Ct. App. Oct. 10, 2001).

Father made six allegations against Mother as the basis for his petition to modify the parenting plan. The six allegations are: 1) that Mother moved in with her paramour and refused to advise Father of the address or telephone number where the children can be located when with Mother, and Mother refused to give Father the name of the person with whom she and the children are residing; 2) Mother denied Father residential time during the summer; 3) Mother intends to move with the children and refuses to provide any information; 4) Mother has told father that if he intends to see the children, he will meet her where she says; 5) Mother refused to attend mediation; and 6) Mother took the children to see a psychologist and withheld that information from Father.

The trial court heard testimony from Father, Mother, the paternal grandfather, the maternal grandmother, the Child's kindergarten teacher, and the Administrative Director of Journey to Recovery, of which Father was a former client and former employee. Although much of the evidence was controverted, Mother's testimony confirmed many of Father's allegations. Father, however, was not without fault as the evidence established Father was not timely in paying the required insurance premiums and the children's medical expenses, and he repeatedly telephoned Mother at work, after she instructed him not to, and that he threatened to "tie this up in court" until he gets his way. In addition to the testimony from the witnesses identified above, the trial court had the benefit of listening to taped conversations between Mother and Father. In its memorandum opinion, the trial court summarizes its findings regarding Mother's conduct as follows:

The court finds that she [Mother] has at best been untimely in responding to legitimate requests for information about the children and has made difficult defendant's [Father's] telephonic communication with the children as allowed by the parenting plan. The plaintiff [Mother] has unilaterally demanded changes in the transportation arrangements as provided in the parenting plan and sees absolutely nothing wrong with her insistence that the defendant [Father] provide all transportation due to her working hours even though she has moved to Portland. It is obvious from the proof that had the defendant [Father] not obtained a Restraining Order preventing her from doing so, she would have violated the initial Restraining Order and would have moved the children to Portland in December of 2003, as indicated in her note to the defendant. The plaintiff [Mother] has indicated that

knowing the children's whereabouts is none of the defendant's business. She indicated that she didn't like to be questioned and this was obvious from her demeanor and attitude on the witness stand. The children have been absent or tardy numerous times while in her care and custody. The plaintiff [Mother] failed to inform the defendant of the day-care arrangements and the fact that the children were seeing a counselor and then initially denied that they were seeing a counselor when questioned by the defendant [Father].

After summarizing its findings, the trial court concluded:

[T]he court is of the opinion that because of [Mother's] demonstrated unwillingness to share relevant information concerning the children with [Father] and her affirmative conduct to make [Father's] contact with his children as difficult as possible, that [Father] is more likely to facilitate a positive relationship between the children and their mother than the mother is to reciprocate.

The evidence does not preponderate against the trial court's finding of a material change in circumstances based upon Mother's unwillingness to cooperate in parenting with Father. That finding gave the trial court the jurisdiction to examine whether it was in the children's best interest to make a change and the relative fitness of the parents.

#### **RELATIVE FITNESS COMPARISON**

Mother contends the trial court failed to properly compare the fitness of the parties. Specifically, she contends it gave too much consideration to Tenn. Code Ann. § 36-6-106(a)(10) to justify its decision to award custody to Father. The factor concerns the past and potential performance of parenting responsibilities, including the willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and other parent. Tenn. Code Ann. § 36-6-106(a)(10).

Part and parcel of Mother's argument is that the trial court did not address the other factors under Tenn. Code Ann. § 36-6-106(a). Although it is important for the trial court to be as detailed as possible, the statute only requires the trial court discuss the factors it considers relevant. It does, however, require a trial court to identify every applicable factor and to state its conclusion as to how each factor impacts the custody determination. *Burnett v. Burnett*, E2002-01614-COA-R3-CV, 2003 WL 21782290, at \*6 (Tenn. Ct. App. July 23, 2003). We believe the trial court fulfilled its role in this regard.

After hearing the litany of criticisms and accusations by each parent against the other parent, the trial court was confronted with the daunting task of sifting through the carnage. In so doing, the trial court relied in part on credibility determinations as well as what it considered to be Father's ability to better facilitate a positive parent-child relationship between Mother and the children, consistent with the best interests of the child. Tenn. Code Ann. § 36-6-106(a)(10). The trial court concluded that Mother had taken affirmative steps to interfere with Father's relationship with the

children. This is a significant finding and the evidence does not preponderate against the finding. Moreover, we find no error with the trial court's conclusion that this was the most significant factor in determining the relative fitness of the parents and deciding what was in the children's best interest.

We therefore affirm the trial court's conclusion that it was in the best interest of the children for Father to be the primary residential parent.

#### **CONCLUSION**

The judgment of the trial court is affirmed in all respects, and this matter is remanded with costs of appeal assessed against Appellant, Catherine M. Morman.

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FRANK G. CLEMENT, JR., JUDGE